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No. 94-1239

In the Supreme Court of the United States

OCTOBER TERM, 1994

FULTON CORP., *Petitioner*

v.

JANICE H. FAULKNER, SECRETARY OF REVENUE, *Respondent*

On Writ of Certiorari to the Supreme Court of North Carolina

MOTION TO DISMISS THE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED

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8pp

TABLE OF AUTHORITIES

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Pursuant to Rule 21 of the Rules of this Court, respondent respectfully suggests that developments since the grant of certiorari in this case make it appropriate for the Court to dismiss the writ of certiorari as improvidently granted.

1. This case involves a Commerce Clause challenge to North Carolina's tax on intangible property. Insofar as is relevant here, the tax was imposed on shares of stock owned by North Carolina residents. Under the so-called "taxable percentage deduction" provision of the statute, residents were permitted in calculating their tax liability to deduct a

percentage of the shares' value equal to the percentage of the issuing corporation's income that was subject to tax in North Carolina. N.C. Gen. Stat. § 105-203. Thus, for example, because 100% of the income of a corporation engaged in business exclusively in North Carolina would be subject to the State's income tax, a shareholder of that corporation could deduct 100% of the value of the shares (leaving no property tax liability). Conversely, the shares of a corporation that did no business in North Carolina and consequently was not subject to the State's income tax would be taxed to the shareholder at 100% of their value.

The petitioner in this case, a North Carolina corporation that itself owned stock in other corporations, brought an action in state court challenging the North Carolina intangibles tax as inconsistent with the Commerce Clause of the United States Constitution. The tax was upheld by the trial court. The North Carolina Court of Appeals reversed, holding the taxable percentage deduction unconstitutional. That court denied petitioner refund relief, however, holding as a matter of state law that the taxable percentage deduction was severable from the remainder of the tax provision. Pet. App. 18a-35a. The North Carolina Supreme Court then reversed in turn, holding the taxable percentage deduction constitutional under *Darnell* v. *Indiana*, 226 U.S. 390 (1912). Pet. App. 1a-17a. The state supreme court accordingly did not reach the question of remedy. This Court granted the petition for a writ of certiorari on April 17, 1995, to address the question whether the taxable percentage deduction violates the United States Constitution. See Pet. i.

2. Respondent submits this motion because, after the grant of certiorari, the State of North Carolina repealed the tax on corporate shares that is at issue in this case. 1995

N.C. Sess. Laws ch. 41.[1] As a consequence, the question on which the Court granted review is of no continuing importance in North Carolina. Nor is it of general significance to the Nation. The trend has been towards repeal of provisions like North Carolina's taxable percentage deduction (in addition to North Carolina, Indiana recently repealed its tax, see Ind. Pub. L. No. 80-1989, 1989 Ind. Acts 912, 919). So far as we are aware, only two States (Kentucky and Pennsylvania) currently have such provisions, and a challenge to the Kentucky tax is now pending in that State's supreme court. *St. Ledger* v. *Commonwealth of Kentucky*, No. 92-CA-2688-MR (Ky. App. May 20, 1994), mot. for rev. granted, No. 94-SC-468-D (Ky. Oct. 19, 1994).

The repeal of the statutory section at issue therefore eliminates the "special and important reasons" for which this Court's certiorari jurisdiction was invoked. See this Court's Rule 10. In such circumstances, the Court often has dismissed the writ as improvidently granted. See, *e.g.*, *Cook* v. *Hudson*, 429 U.S. 165 (1976) (per curiam) (writ dismissed, in part, because newly enacted statute prevented issue from arising again); *Morris* v. *Weinberger*, 410 U.S. 422 (1973) (per curiam) (writ dismissed where Congress amended challenged portion of Social Security Act twenty days after writ granted); *Triangle Improvement Council* v.

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[1] Although the repeal coincidentally was effected on April 18, 1995, the day after certiorari was granted, it plainly was not motivated by this Court's decision to review this case. The bill to repeal the intangibles tax was introduced in the North Carolina Senate on January 26, 1995 (see N.C. Sen. Bill 8), was reported favorably by committees of the North Carolina Senate and House on February 7, 1995, and March 8, 1995, respectively, and was approved by the respective Houses of the Legislature on February 9, 1995, and April 17, 1995. There accordingly can be no doubt that the taxable percentage deduction would have been repealed regardless of the Court's decision to grant review.

Ritchie, 402 U.S. 497 (1971) (per curiam) (writ dismissed where Congress repealed Act on which petitioner based challenge to highway project); *Sanks* v. *Georgia*, 401 U.S. 144 (1971) (writ dismissed where challenged portions of statute were amended); *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955) (writ dismissed where newly enacted statute prevented case from arising again).

3. Although repeal of the challenged tax does not render this case moot because petitioner is seeking refund relief, that should not preclude dismissal of the writ. In similar circumstances, the Court has noted that "it is very important that we be consistent in not granting the writ of certiorari except in cases involving *principles* the settlement of which is of importance to the public, as distinguished from that of the parties * * *." *Rice*, 349 U.S. at 79 (citation and internal quotation marks omitted) (emphasis added). The Court has emphasized that "[t]his is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless such avoidance becomes evasion." *Id.* at 74. See also *Triangle Improvement Council*, 402 U.S. at 499 (Harlan, J. concerning) ("the exercise of our powers of review would be of no significant continuing national import"); *Sanks*, 401 U.S. at 151 (dismissing writ even though subsequent change in statute might not protect petitioner; "it has always been a matter of fundamental principle with this Court, a principle dictated by our very institutional nature and constitutional obligations, that we exercise our powers of judicial review only as a matter of necessity").

That principle applies with particular force in this case because petitioner and other similarly situated North Carolina taxpayers most likely would *not* obtain a refund even if petitioner were to prevail on the merits of its Commerce Clause challenge in this Court. Petitioner itself acknowledged in its petition for certiorari (at 3 n.1) that it "does not here

seek review of the federal issues raised by the adverse decision of the North Carolina Court of Appeals on its refund demand"; petitioner also "under[stood] that those issues can be reconsidered by the North Carolina courts in the event that this Court reverses and remands the North Carolina Supreme Court's decision." And given the state court of appeals' conclusion as a matter of state law that the taxable percentage deduction should be severed from the remainder of the tax code, it surely is probable that petitioner would not ultimately obtain refund relief on remand to the state courts.[2]

4. In sum, this case now presents an essentially hypothetical question that is of no continuing importance in North Carolina and is of very little significance elsewhere. Resolution of that question will not settle even the entitlement of the petitioner in this case to a refund remedy. In these

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[2] Under *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39-41 (1990), a State may remedy a tax that discriminates against interstate commerce by retroactively raising the taxes of in-state beneficiaries of that discrimination. While the North Carolina Constitution generally precludes retroactive taxation (see N.C. Const. art. I, § 16), that rule may not apply where a tax increase remedies a federal constitutional violation. Yet such a retroactive tax increase would be of no benefit to petitioner, which (in contrast to the taxpayer in *McKesson*, see *id.* at 42-43), is not a competitor of North Carolina residents who own the shares of in-state corporations and whose taxes would be increased by such a remedy. As a result, there is reason to doubt that petitioner would obtain any benefit from a victory on the merits in this case. We also note that petitioner's demand for a refund essentially seeks a windfall. The real "victims" of the assertedly unconstitutional discrimination in this case are the out-of-state corporations whose sale of stock in North Carolina purportedly was burdened by the taxable percentage deduction. A refund here, however, would go not to those corporations but to petitioner, a North Carolina resident. Such a refund would not advance any Commerce Clause value.

circumstances, it would be appropriate for the Court to dismiss the writ of certiorari as improvidently granted.

Respectfully submitted.

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